COMPLEX LITIGATION – PRACTICE QUESTION

Here is a realistic sample question that could constitute one of the two fact patterns on the exam. Of course, this is not intended to indicate exactly what will be covered (or how) on the exam. As you know, we will have two fact patterns with multiple questions. The raw point totals for each fact pattern and for each question will be indicated. For example, this question would have 58 raw points. Usually, the two fact patterns are of very similar raw point values.

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Airline, Inc., a Pennsylvania (PA) corporation with its principal place of business in Philadelphia, PA, operates a low-cost airline between eastern cities. On a flight from Washington DC to Philadelphia, a malfunction in the plane's air circulation system – described by experts as a "one in ten million freak accident" – caused the 150 passengers to be exposed to potentially lethal levels of carbon monoxide. Oxygen masks, which were supposed to deploy in such cases, failed to operate. Passengers and crew were subjected to the unhealthy air for over 20 minutes, while the plane flew over Maryland and Delaware, into New Jersey airspace. The pilot, fighting to maintain consciousness, managed a heroic crash landing on a farm in southern New Jersey. Fifteen passengers died as a result of the impact on the crash landing.

In addition to these 15, medical evidence indicates that 40 passengers had died from inhalation of carbon monoxide before the crash. The remaining 95 passengers were all rushed to hospitals in the surrounding area – some in Delaware, some in New Jersey, and some in Pennsylvania. Of these, 30 subsequently died in the hospital – 10 from inhalation of carbon monoxide, 10 from injuries sustained in the crash landing, and 10 from a combination of the two. The 65 who survived suffered a variety of injuries. Thirty have brain damage from the inhalation of carbon monoxide. They are unable to work and will require medical care their entire lives. The other thirty have recovered sufficiently to return to work and to their normal routine. Every passenger suffered mental anguish from knowing that something was frightfully wrong on the flight.

You are an associate at a Philadelphia law firm. A partner tells you that four clients have retained the firm regarding potential litigation. One represents a passenger who died from inhalation of carbon monoxide while the plane was aloft. One represents a passenger who died from injuries suffered in the crash landing. One represents a survivor who suffers permanent brain damage. And one is one of the lucky ones who has returned to his normal life, although he had medical expenses, lost wages and suffered mental anguish.

The partner wants to bring a class action in federal court – either in Philadelphia (E.D. Pa.) or Newark, NJ (D.N.J.). She does not want to litigate in state court. She proposes the assertion of state-law claims on behalf of all 150 passengers. Ninety of the passengers were citizens of Pennsylvania, 30 were citizens of New Jersey, and the remaining 30 were citizens of other states. The partner estimates that each of the 150

passengers' claims will exceed $100,000, with the wrongful death cases involving hundreds of thousands of dollars each.

In addition to Airline, the partner wants to name as defendants Manufacturer, Inc., which built the plane, and Component, Inc., which manufactured the system for deploying the oxygen masks. Manufacturer is incorporated in Delaware with its principal place of business in South Carolina. Component is incorporated in Delaware with its principal place of business in California. Assume that all three defendants would be subject to personal jurisdiction in Pennsylvania and New Jersey.

THERE ARE FIVE QUESTIONS ON THIS FACT PATTERN.
PLEASE LABEL YOUR ANSWER TO EACH QUESTION BY NUMBER.

1. Write the class definition. (Do not write *about* the class definition; I do not want an essay about factors that go into the definition. I want the definition.) (4 points)

2. Subpart (a): Will the class action against the three defendants invoke subject matter jurisdiction under CAFA? Subpart (b): In light of the discretionary, local controversy, and home state exceptions to CAFA, do you recommend filing suit in E.D. Pa. or D.N.J.? Explain. (10 points)

3. How is the court likely to rule on a motion to certify the class? Do not discuss subject matter jurisdiction. (26 points)

4. The airplane landed on a farm owned by Farmer. It caused minor damage of $4,000 to property. Farmer filed suit in a state court in New Jersey, seeking $4,000 damages from Airline. Can Airline remove that case to the court in which the class action is filed under the "piggyback" jurisdiction provision of MMTJA (§ 1441(e)(2))? Explain. (10 points)

5. Assume that a year has passed since this class action was filed. Regardless of your conclusion to Question 3, assume that the court certified the class as you defined it in Question 1. The partner with whom you have worked is appointed as class counsel. Now a different law firm files a class action in state court in a proper Pennsylvania state court. It is on behalf of the 90 PA citizens who died on the flight, and names only Airline as a defendant. It asserts only state-law claims. Because that case does not have even minimal diversity, it cannot be removed to federal court. The partner with whom you work is furious that the state-court case will interfere with efforts to settle the federal case, though settlement discussions have not advanced very far. She asks you whether the federal court can issue an injunction against the parties to the state-court case, barring them from proceeding in state court. What do you tell her? (8 points)

Here are the sorts of things I would be looking for. Before grading the exams, I would create a checklist allocating points to the various issues.

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1. All passengers on Airline flight ___ on [date] and all representatives of deceased passengers and representatives of incapacitated passengers who, as a result of malfunction(s) in the ventilation system on that flight, suffered injury in or in airspace over Maryland, Delaware, Pennsylvania, or New Jersey, consisting of mental anguish and physical injuries, including death from inhalation or impact or brain damage from inhalation or impact, and who received medical treatment as a result of such injury.

2. Subpart (a). CAFA requires a class of more than 100 members; we have 150. CAFA requires that any class member be of diverse citizenship from any defendant; we have members who are citizens of NJ, who are diverse from defendant Component, which, because incorporated in DE with its PPB in CA, is a citizen of those two states. Thus, the fact that the other defendants (Airline and Manufacturer) are citizens of NJ because incorporated there, does not destroy diversity. CAFA requires damages in the aggregate in excess of $5,000,000; here the claims are said to average $100,000 and there are 150 of them, for a total of $15,000,000. Thus, CAFA jurisdiction is invoked.

Subpart (b). The CAFA carve-outs depend upon the number of class members and defendants who are citizens of the forum. Both the "local controversy" and "homes state" exceptions require that more than two-thirds of the class members be citizens of the forum. This will be true in neither PA nor NJ. The facts say that 90 of the 150 are citizens of PA – that's sixty percent, not two-thirds. And only 30 are citizens of NJ – that's only one-fifth.

But the "discretionary" carve-out applies if more than one-third but fewer than two-thirds of the class members and the "primary defendants" are citizens of the forum. Clearly, PA qualifies here, because, as noted, 60 percent of the members are PA citizens. The exception also requires, however, that the "primary defendants" be citizens of that forum. Only one of the three defendants, Airline, is a citizen of PA, since it in incorporated and has its PPB there. The other two defendants are incorporated and have their PPB in states other than PA. Arguably, one of three defendants does not constitute "primary defendants," so the exception should not apply in E.D. Pa. On the other hand, perhaps the statute is met if the most significant defendant is a citizen of that state. To be safe, maybe the case could be filed in D.N.J., where the discretionary exception plainly does not apply.

3. Under 23(a)(1) the class must be so numerous that joinder is impracticable. The inquiry consists of more than raw numbers, though 150 plaintiffs might be cumbersome to handle under Rule 20 (competing lawyers, for instance). On the other hand, joinder may not be difficult because the vast majority of the class has citizenship in a close geographic range. But joinder of the individuals under Rule 20 would make it

impossible to invoke diversity of citizenship jurisdiction. So perhaps joinder is not practicable.

Under 23(a)(2), there must be commonality. Though *Wal-Mart* has heightened the importance of this factor, here it should be easy to meet. The common question is causation of harm. The ventilation malfunction(s) caused harm to a contained group in a specific place over a limited time and led to the crash. In "one stroke," the determination of what caused the malfunction will determine all claims. In other words, all passengers were exposed in the same way to the same harm.

Under 23(a)(3), the rep's claim must be typical of the class claims. Here there is a wide range of harms, so there is a potential *Falcon* problem. That case held that the rep must suffer the same harm – not just the same overall type of harm. Here the issue is handled by using different reps. The partner has told us that we have a rep who died from inhalation, a rep who died from impact, a rep who suffered permanent brain damage, and a rep who has since recovered. Among them, these seem to cover all of the specific harms allegedly suffered by the class. There is no *Lamar* problem, meanwhile, because each member dealt directly with all three defendants.

Under 23(a)(4), the rep must adequately rep the interests of the class. We have noted that the reps here have suffered the same harms. We would inquire into their willingness to serve and to pay for notice, which will be required if the case proceeds as a 23(b)(3) (as we hope).

In addition, we need to have a defined class, one that strikes the judge as manageable. And because we will seek 23(b)(3) certification, we need greater specificity in the definition of the class. This is possible here. Indeed, we can name the class members individually. They and their next of kin will be easy to identify. Moreover, each required hospitalization, so there will be records of medical treatment and bills.

Under 23(b)(3), we need to show that common questions predominate over individual questions. Here, there will be individual questions of damages, to be sure. But the causation of the harm – toxicity of the air and failure of the oxygen system, followed by impact – will be the same for all. Litigation en masse will advance the conclusion of litigation for all 150 members, even if individual hearings will be required for damages. Conceivably, we could have subclasses for each type of harm.

On the other hand, choice of law is a problem. The laws of four states may apply to various members, depending upon when they were injured. Perhaps this can be addressed by subclassing along state lines. And, since this is not a cutting-edge tort, it seems likely that there will not be great divergence of law among the states.

In addition, under 23(b)(3), we must show that the class action is superior to other methods for resolving the dispute. The claims are garden-variety torts, and not "immature" torts. Thus we might be comfortable having a single adjudication bind all

parties. And the case may involve difficult issues of proof regarding scientific evidence. It may be desirable not to relitigate those issues multiple times.

Another possible course would be to hold selected trials of test cases and permit the use of nonmutual offensive issue preclusion should the plaintiffs win. Federal common law governs that issue, but, as seen in Semtek, the federal often looks to state law for content of federal common law. Because of different approaches to nonmutual preclusion, this might not be a viable option.

In a 23(b)(3) class, the rep will have to pay to give individual notice, because each is identifiable. This will not be expensive – it's mailing to 150 people. But each will have the right to opt-out. This class does not assert negative value claims. These claims are likely to be the largest asset each member has. It is likely that many will opt out because they want to control their own destiny on such large matters. This, in turn, could threaten numerosity.

4. Under the piggyback provision, a defendant in the state case must also be a defendant in the federal case; this is true for Airline. In addition, the federal case must be one that could have been brought under MMTJA. MMTJA has no amount in controversy requirement and requires only minimal diversity. That is met, for reasons discussed above in Question 2. In addition, it requires that at least 75 persons have died in a "single accident." Here, 15 died on impact, 40 died in the air from inhalation, and 30 died in hospitals. Thus, 85 died.

In addition, however, MMTJA requires that something happen at a "discrete location." It is not clear whether this refers to the accident or the deaths. The deaths occurred at various locations – in the air over four states, on the impact in NJ, and in hospitals in different states. Arguably, though, the "accident" occurred at a discrete location – where the ventilation failure(s) occurred.

Further, MMTJA requires that any defendant reside other than where the accident occurred or that any two defendants reside in different states or that a substantial part of the accident occur in different states. Here, arguably, the accident occurred in the air over more than one state. And two defendants "reside" in different states. Component is incorporated in DE with its PPB in CA. Airline is incorporated in PA with its PPB in PA. But those are the companies' citizenships. Residence, at least for venue purposes, is defined as all districts in which the company is subject to personal jurisdiction. Component is subject to personal jurisdiction in CA and Airline evidently is not, since it only does business on the east coast. So yes, Airline can remove under MMTJA.

5. Because the state-court case was commenced before the federal court issued an anti-suit injunction, the AIA applies. Thus, the federal court cannot issue the injunction unless (1) authorized by Congress – there is no indication of that here, (2) to effectuate a judgment – that does not apply because no federal judgment has been entered, or (3) if necessary in aid of its jurisdiction. Though courts have applied the third exception to in personam cases, it is proper only if the federal court is so close to concluding the

proceeding that state litigation will frustrate its effort to resolve the dispute. In *Diet Drugs*, for example, the state case would essentially undo a global resolution on which the federal court had invested great time and effort. Here, settlement discussions are barely underway, and the federal case is nowhere near wrapped up. Weighing the nature of the federal case, the state case, and the interest of comity, the federal court will deny the injunction.